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wh Newsletter

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ANTI-SUITS : EUROPE – NO; US (AND ELSEWHERE) – YES

The Advocate General of the European Court of Justice has released an opinion in Allianz v. West Tankers (the "FRONT COMOR") that anti-suit injunctions in support of arbitration proceedings offend EC Council Regulation 44/2001, the successor to the Brussels Convention on Jurisdiction and Judgments within the European Union. Accordingly, provided the European Court of Justice adopts this opinion, as is expected to be the case, where proceedings are commenced in EU States in breach of an arbitration agreement, the local Court will need to be persuaded that the proceedings should be stayed and the English Courts may no longer issue anti-suit injunctions to ensure this occurs.

English anti-suit injunctions may however still be issued in respect of recalcitrant proceedings commenced outside the European Union and a recent example was reported in Ace Insurance v. CMS Energy. CMS sued Lloyd's Syndicates in respect of a political risk claim before the Courts in Michigan relying on a US service of suit clause. The Court issued an injunction holding that where there was an agreement in the policy that all disputes should be referred to London arbitration together with a US service of suit clause the arbitration agreement prevailed.

OBLIGATION TO PERMIT RIGHTSHIP INSPECTION

The "SILVER CONSTELLATION", a capesize bulker, was chartered on the NYPE form containing the following clauses:

1. That whilst on hire the Owners shall ... maintain her class and seaworthiness and keep the vessel in a thoroughly efficient state in hull, holds and hatch covers machinery and equipment with all certificates necessary to comply with current requirements of all ports of call ... for the service and at all times during the currency of this Charter ... [Line 38]

8. That the Captain shall prosecute his voyages with the utmost despatch, and shall render all customary assistance with ship's crew ... The Captain (although appointed by the Owners) shall be under the orders and directions of the Charterers as regards employment ...

31. Certificates, Laws and Regulations

    a) It is a condition of this Charter that the vessel is and will remain in all respects eligible for trading to the ports, places or countries specified or not excluded in this Charter and that at all necessary times vessel and/or Owners shall have all valid certificates records and other documents required for such trade. Furthermore, it is a condition of this Charter that the vessel complies and will continue to comply with all applicable laws and regulations of the ports, places and countries specified or not excluded in this Charter.

    b) It is a condition of this Charter that the vessel is and will remain during the currency of this Charter in possession of the necessary valid equipment and all certificates, records and documents necessary to comply with safety and health regulations, international regulations and all current requirements at all ports of call, Suez Canals included."

Disputes arose under the Charter concerning the RightShip approval system, the aim of which is to identify vessels suitable and safe for the carriage of iron ore or coal cargoes. The system had been operated by shippers and terminal operators in Australian ports since inception and (as the Tribunal found) would, by the date of the Charterparties in the present case, have been in the minds of those involved in the transportation of coal/iron ore.

In February 2007, Charterers asked Owners to complete the RightShip vetting questionnaire for an intended iron ore voyage. The Master completed the questionnaire and provided the required documents. RightShip requested an inspection of the vessel and Owners duly contacted RightShip to arrange the inspection which RightShip proposed for the next discharge port. Owners told Charterers that in return for Owners reinstating the vessel's RightShip status, they wanted an increased rate of hire. The Charterers said the failure to reinstate it would reduce the vessel's trading capacity and would break Owners' obligation to keep the vessel fitted for the trade, including Australia. No RightShip inspection took place despite requests and in January 2008, RightShip approval was denied.

The Tribunal was asked to decide (1) whether pursuant to Clause 8 and/or Clause 31 of the Charter the Owners were obliged to provide a vessel with RightShip approval and to maintain such approval for the currency of the Charter and (2) whether Owners were obliged to permit a RightShip inspection of the vessel and other RightShip vetting procedures as and when required by Charterers pursuant to clause 8 and/or pursuant to implied duties of cooperation. The Tribunal found in favour of Charterers on both questions.

Owners appealed. In relation to the first issue, they submitted there was no express reference in the Charter to RightShip approval and it was not necessary to imply such an obligation.

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On appeal in the Commercial Court, the view of Mr Justice Steel was that Clause 31 focused upon requirements legally imposed either by the law of the flag, the law of the country to which the vessel had been ordered, or the laws of the port of call. The heading to Clause 31 emphasised this. RightShip approval was a commercial requirement which had become progressively more widespread since its introduction in 2001. Clauses 8 and 31 focused on certification and documentation which in turn established fitness and eligibility but the RightShip scheme did not give rise to the provision of any documentary form of certification.

It was relevant that specific provision was made in the Charterparty for a whole range of certificates. This gave rise to a strong inference that, given the absence of RightShip approval (something that the Tribunal had found they would expect to be addressed in the Charterparty), no such approval was required. This was all the more so where the Charter focused almost exclusively on iron ore and coal cargoes and thus involved trading to the hotbeds of the RightShip system such as Australia.

Accordingly, the Judge decided the Tribunal had wrongly concluded the Charterparty required Owners to obtain and retain RightShip approval.

With regard to the second issue, namely whether there was any contractual obligation on the part of Owners to permit RightShip inspectors on board, even absent an obligation to maintain RightShip approval, the Judge decided that merely because the Charter might be concerned about the state of the vessel's class, this was not accompanied by an entitlement to insist upon a classification survey. RightShip approval was to be obtained voyage by voyage and was dependent on the requirements of the relevant shipper/loading terminal. A close analogy is the need to allow shore inspectors on board to inspect the cleanliness of holds.

The Tribunal had rightly concluded the words "under orders and directions of the Charterers as regards employment" in Clause 8 obliged Owners to permit a RightShip inspection for the purpose of RightShip approval. It was an order "as regards employment".

NO ORDER TO DISCLOSE INSURANCE COVER

We previously reported an affirmative response to such an application in the case of Harcourt v. Griffin. Mr. Justice Beatson in the Commercial Court Judge in the case of West London Pipeline and Storage v. Total has now reached an opposite conclusion finding that the Civil Procedure Rules and their overriding objective did not serve to change the pre-existing law so that the Court has no jurisdiction to grant an order of this type.

WRONGFUL ATTACHMENT IN NEW YORK

A dispute arose between the Owners and Charterers of "NICHOLAS M" under a Charterparty which contained a London Arbitration and English Law Clause. The Owners obtained a Rule B attachment against the Charterers in New York and commenced arbitration. The Charterers claimed the attachment was wrongful and obtained a Freezing Order against the Owners from the English High Court in support of that claim. The Owners challenged the Freezing Order. Mr. Justice Flaux decided three main points.

First he had to decide whether the governing law in relation to the wrongful attachment claim was English law or US law. The fact that the Charterparty was governed by English law did not connect the tort of wrongful attachment with English law to make it substantially more appropriate for the applicable law to be English law rather than US law. The most significant factor was that the attachment was obtained in New York, hence the tort was committed there and a good arguable case arose that US law was the applicable law. On that basis, applying US law, there was a good arguable case the Charterers had a cause of action.

Even if the Judge was wrong on that point and English law applied, he considered the Charterers still had a good arguable case on the basis any tort of wrongful attachment of assets in maritime proceedings is a limited extension of the existing tort of wrongful arrest.

Second, the Judge determined that a cause of action for wrongful attachment can accrue before that attachment has been declared wrongful and accordingly under English law and US law the basis of such a claim can exist before the Order is vacated.

Third, he held that the Owners' conduct demonstrated a real risk of dissipation of assets and observed "these Owners are the sort of people who will stop at nothing to frustrate the Charterers from making any substantial recovery by dissipating their assets, unless restrained by the Freezing Order".

Application dismissed.

"LOST OR DAMAGED" VERSUS "LOSS AND DAMAGE"

In the "LIMNOS" Mr. Justice Burton considered whether Article IV Rule 5(a) of the Hague Visby Rules covers only physical loss and/or damage or whether it also covers economic loss and/or damage.

The vessel "LIMNOS" carried a cargo of 43,998.66 mt of corn from Louisiana to Aqaba. During the voyage the cargo suffered damage from seawater ingress into the vessel. Part of the cargo was therefore disposed of; another part was damaged but retained. Prior to discharge the damaged cargo had to be shifted between silos as the local authorities required the cargo to be fumigated and treated with chemicals before the vessel was allowed to discharge. This procedure increased the number of broken kernels. Consequently, the value of the cargo depreciated by US$362,142 and it additionally acquired the local reputation of being a distressed cargo as a result of which its market value dropped by US$13 per ton or US$571,842.26.

The cargo interests sought to recover the market loss of the wet cargo and various other losses amounting to US$1.55 million.

The Bill of Lading incorporated the Hague Visby Rules which at Article IV Rule 5(a) limit the liability of the carrier in proportion to "the goods lost or damaged".

A preliminary issue came before the Court whereby it was necessary to determine what was meant by "the goods lost or damaged" and whether this was intended to deal with physical loss/damage exclusively or also deal with consequential economic loss/damage.

The Owners argued that the expression was only concerned with physical loss and therefore their liability was limited to the gross weight of the damaged or "conceded" cargo. Cargo interests argued that the limitation was applicable to the entire devaluation of the cargo. They submitted that the expression "loss or damage" included economic loss and this must be read synonymously with the expression "goods lost or damaged" in Rule 5(a).

The Court rejected the cargo interests' submissions and held that the expression "goods lost or damaged" did not have the same meaning as "loss or damage". The former covered two categories. On the one hand, it referred to "goods lost in the sense of vanished, gone, disappeared [or] destroyed" and on the other to "damaged in the sense of not being lost, but surviving in damaged form". By contrast loss normally included economic loss and damage normally related to matters of a physical nature. The Owners succeeded on the issue and their liability was limited to the gross weight of the "conceded" cargo.

OBLIGATION TO NOMINATE A DELIVERY PORT PRIOR TO CANCELLATION DATE

In the "AILSA CRAIG" the Charterers chartered the vessel on an amended Shelltime 4 Charterparty on terms that delivery was to take place "at a port in WAF-Ghana/Nigeria range in Charterers' option" and that the last day of delivery was to be 15 November 2007.

The Charterers cancelled the Charter on 16 November 2007 due to the fact that the vessel was still drydocking in Piraeus at the time, and subsequently brought an action against the shipowners. An issue arose as to whether the Charterers were entitled to cancel the Charter in the absence of them having nominated a specific delivery port before the cancellation date.

The Charterers argued that under the terms of the Charterparty they were not obliged to nominate a port at all and even if they were, the time for doing so never arose. The reason for this was that, by their argument, they could not name a particular port before they had received a notice of estimated delivery from the shipowners. Further, they said the obligation to nominate only arose by the time when the shipowners needed to know the port in order to avoid delay to the vessel when it reached its deviation point. In any case, a nomination was futile since no matter which port the Charterers had nominated the vessel would not have been able to reach that port in time as it was in drydock.

The Court rejected the Charterers' argument in so far as the obligation to nominate a port was concerned. Mr Justice Christopher Clarke held that under normal circumstances Charterers were under an obligation to nominate a delivery port. The timing of such nomination was to be reasonable which meant that it had to occur (a) not so late as would mean that because of the lateness of the nomination the vessel could not make her cancelling date and (b) early enough to ensure that the vessel suffered no delay resulting from the absence of nomination.

It follows that Owners can ensure compliance with Charterparty terms by reaching the deviation point without receiving a nomination. Any delay by reason of lack of nomination after the vessel has reached the deviation point is for Charterers' account. In this particular case the vessel never made the deviation point and the time for Charterers to nominate the delivery port never arose. The vessel was not late due to the absence of a nomination, but because of its stay in drydock.

The Court also held that as the vessel was nowhere near the deviation point it would be a futile exercise to nominate a delivery port, therefore Charterers did not need to nominate a port in this particular instance.

CHARTERERS' LIABILITY FOR BUNKERING COSTS WHEN CHANGING THE NOMINATED LOAD PORT

In the "ANTIPAROS" the vessel was chartered by the Charterers for a voyage from the Arabian Gulf to South Korea or Japan on an amended Asbatankvoy form. The Charterers indicated loading would take place at Ras Laffan, Qatar and either Ras Tanura, Saudi Arabia or Mina Al-Ahmadi, Kuwait.

During the voyage to the load port Charterers made enquiries with the Master as to the quantities of bunkers on board and the Master advised a necessity to bunker at the load port.

Subsequently, Charterers nominated the load ports to be Ras Laffan and Mina Al-Ahmadi. Owners therefore arranged to bunker IFO at Mina Al-Ahmadi at a price of US$301 per mt.

However, two days later Charterers informed Owners the load port was to change and loading would now take place at Ras Laffan and Ras Tanura after all. The Owners were able to cancel the bunker stem at Mina Al-Ahmadi without incurring any penalties and replace them with arrangements at Ras Tanura. The price for bunkers at Ras Tanura was significantly higher at US$355 per mt IFO, a difference of US$217,721.52. The Owners claimed this amount from Charterers on the basis of Clause 4 of the Charterparty which provided for load ports to be nominated by the Charterers during a certain time period and that "any extra expense incurred in connection with any change in loading or discharging ports (so named) shall be paid for by the Charterer and any time thereby lost to the vessel shall count as used laytime". Charterers argued Clause 4 gave them the express right to change the load port. Further, the liability to pay for extra expenses related to expenses as a result of deviation, as opposed to merely changing load ports.

Mr. Justice Andrew Smith held that Clause 4 did not entitle

Charterers to change the nominated load ports. He concluded the Clause was not restricted to the expenses incurred by the Owners relating to deviation. The Owners were awarded the price differential of US$217,721.52.

EVERYTHING UNDER THE SUN

A recent London arbitration involved a surprisingly varied miscellany of typical issues that arise between Charterers and Owners under the NYPE form.

As the first issue the Tribunal was asked to consider whether Charterers were correct in twice placing the vessel off hire when for a short period the vessel was placed under arrest by cargo receivers. Hire payable in the event of the arrest of the vessel was governed by Clause 59 which stated :

"...hire under this Charter shall not be payable in respect of any period whilst the vessel remains under arrest and is not at the full disposal of the Charterers..."

The Tribunal held Charterers had provided no evidence of their voyage orders being affected by the arrest and, because of the delay caused by Charterers in providing orders after the release of the vessel, on the evidence no time was actually lost by Charterers during the period of arrest and the vessel was not therefore offhire.

It was in our view incorrect to reach the conclusion that for the vessel to be offhire, time actually had to be lost. This was not a requirement of Clause 59 under which the deduction was made.

By contrast, the second issue involved Charterers placing the vessel offhire for 1/4th of the time a crane remained broken. Clause 21 of the Charterparty which dealt with cargo gear stated:

"...the vessel is to be considered offhire to the extent that time is actually lost to the Charterers..."

Charterers also relied on Clause 15 of the Charterparty which stated:

"In the event of loss of time from breakdown of equipment preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost..."

Owners maintained that Clause 21 provided for a net loss of time and submitted no time had been lost. The Tribunal held on the evidence the vessel was either occupied during the periods of incapacity or that work in the holds was not affected by the failure of the cranes. Clause 21 prevailed over Clause 15. As no time had been lost due to crane breakdown the vessel was not offhire.

As a third issue the vessel was chartered for a duration of "about 70/90 days without guarantee". The Charter actually lasted for 147.5625 days. The Owners alleged that the undertaking with regard to duration had not been made in good faith and further contended that the words "about" and "without guarantee" allowed Charterers no more than 3 additional days.

The Tribunal held the words "about 70/90 days without guarantee" served as an indication of the estimated duration of the business and that on the evidence, it was given reasonably. The Owners' claim was dismissed. In our view this finding was also wrong since we consider the governing criterion should have been whether the estimate was given honestly.

As a fourth issue the vessel's hull was found to have been fouled by barnacles. It was alleged by Owners that this was as a direct result both of the prolongation of the Charter period and the vessel's prolonged stay in warm tropical waters. In reliance on the "KITSA", Charterers contended the risk of hull fouling was foreseeable and that Owners failed to provide proof of the condition of the hull prior to the commencement of the Charter.

Having already held the Charterers were not liable for the prolongation of the Charter and noting that Owners offered no evidence the vessel was clean at the start of the Charter the Tribunal dismissed the Owners' claim.

Issue five arose from a berthing manoeuvre at night when, whilst under the orders of a pilot, the vessel was damaged in a collision. The Owners alleged this was as a result of the port and/or berth being unsafe. In response to this, Charterers raised the issue of pilot negligence provided under Clause 25 of the Charterparty and the Master's duty of safe navigation.

The Tribunal held that despite guidance found in Ports of the World not to use this particular berth at night, the Master was following the instructions of the port authority in doing so. It agreed with Owners that a lack of navigational lights, together with the circumstances of the port authority's order, rendered the berth and port unsafe at the material time. Subject to adjustment of quantum, the Owners' claim succeeded.

As the sixth and final issue, as security for their claims against the Charterers, the Owners arrested bunkers belonging to Charterers onboard another vessel. Security was provided under reservation of Charterers' position.

Charterers brought a counterclaim for wrongful arrest before the Tribunal. Not only did the Tribunal feel that this head of case lacked merit, the fact that issues of security and jurisdiction had been pursued through local courts after the commencement of arbitration proceedings meant that Charterers were estopped from reopening the issue with the Tribunal.

The above are only intended to be short summaries.

If you require any further information please feel free to contact us.

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